TABLE OF AUTHORITIES.

	Page
Cases:	
Ford Motor v. Huffman, 345 U. S. 330, (1953) ..	3
Graham v. Brotherhood of Locomotive Firemen, 338 U. S. 232 (1949), Railway Labor Act ..	3
Humphrey v. Moore, 375 U. S. 355 (1964)	3
Local Union No. 12 v. NLRB, 368 F. 2d. 12, 24..	3, 7
Local 57, ILGWU, AFL-CIO v. NLRB, 374 F. 2d. 295 (C.A.D.C., 1967)	6
NLRB v. Seine Line Fishermen's Union of San Pedro, 374 F. 2d. 974 (C.A.L., 1967)	6
Steele v. L & N Railroad Co., 323 U. S. 192 (1944)	3
Turnstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210, (1944), Railway Labor Act	3
Vaca v. Sipes, 87 S. Ct. 903, 17 L. Ed. 2d. 842 ..	3
Miscellaneous:	
Blumrosen, WORKER-UNION RELATIONSHIP, Mich. L. Rev., Vol. 61, pp. 1435, 1500	5, 6
Sherman, Union's Duty of Fair Representation and The Civil Rights Act of 1964, Page 820	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967—No. 194.

OCTOBER TERM, 1966—No. 1425.

LOCAL UNION No. 12, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL-CIO,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR RE-HEARING—AFTER DENIAL OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

This Court on the 9th day of October, 1967, denied the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Extension of time to December 2, 1967, was granted for filing this petition. (Exhibit I.)

In the absence of clarification and guidance from this Court chaotic conditions can now exist in process-

ing grievances as a part of the general administration of unions.

Certiorari should now be granted in this the *first* clear cut presentation of the issue that breach of union's duty of fair representation in an unfair labor practice. *Never* before has the issue been squarely presented to this Court.

The NLRB speaking through then Solicitor General Honorable Thurgood Marshall agreed that "a final resolution of the question by this Court is warranted", and stated as follows:

> "The question whether a union's breach of its duty of fair representation constitutes an unfair labor practice under the National Labor Relations Act, however, is of substantial importance, both in the administration of the Act and in the conduct of labor-management relations generally. The problem has been the subject of extensive comment in the law reviews and other journals (see Pet., No. 194, pp. 30-31, n. 11). And only recently, in *Vaca v. Sipes*, 386 U.S. 171, 186, this Court assumed, for purposes of deciding the preemption issue there presented, that breach of duty of fair representation was an unfair labor practice. In these circumstances, a final resolution of the question by this Court is warranted.
>
> Accordingly, the Board does not oppose the granting of the petitions in these cases." (NLRB Memorandum on Petitions for Writs of Certiorari, page 3.)

Thus, there is the question as to whether the breach of a union's duty of fair representation is an unfair labor practice and if so, does the NLRB have exclusive jurisdiction.

A refusal of certiorari here leaves the Fifth Circuit in the posture of permitting only the National Labor Relations Board to process charges of unfair labor practices dealing with the breach of the union's duty of fair representation,[1] while this Court in *Vaca v. Sipes*,[2] denies that the preemption doctrine is applicable.

It results that both Courts and the Board apparently have jurisdiction of this brand new unfair labor practice.

For twenty-four years this Court has resolutely ruled on important issues dealing in human rights threatened by employer, by the union, or by an unholy combination of the two.[3]

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[1] *Local Union No. 12 v. NLRB*, 368 F. 2d. 12, 24; (Certiorari denied, October 9, 1967).

[2] *Vaca v. Sipes*, 87 S. Ct. 903, 17 L. Ed. 2d. 842.

[3] *Steele v. L & N Railroad Co.*, 323 U. S. 192 (1944)
(The duty of fair representation rests on majority union, under Railway Labor Act, 44 Stat. 577 (1926) as amended 45 U.S.C., Section 151-188.)
Turnstall v. Brotherhood of Locomotive Firemen, 323 U. S. 210, (1944), Railway Labor Act.
Graham v. Brotherhood of Locomotive Firemen, 338 U. S. 232 (1949), Railway Labor Act.
(Court held that union's failure to represent Negro minority within the craft could be enjoined despite Norris LaGuardia Act, 47 Stat. 70 (1932) as amended 29 U.S.C., Section 101-115 (1958.)
Ford Motor v. Huffman, 345 U. S. 330, (1953)
(Union acted properly in negotiating seniority credit clause for veterans and indicated possible judicial relief under NLRB if union breached duty of fair representation.)
Humphrey v. Moore, 375 U. S. 355 (1964)
(Decided prior to adoption of Civil Rights Act.)

Now on the threshold of developing the most important doctrine dealing with a union's relation to members and non-members alike, it is imperative that full scale hearing be given. To fail to do so ignores the impact of The Civil Rights Act of 1964 and creates unnecessary duplication of effort.[4]

> "But the NLRB should not be permitted to grant affirmative relief under its unfair labor practice jurisdiction for breach of a union's duty of fair representation based on discrimination covered by title VII of the Civil Rights Act. For such discrimination title VII procedures should be followed."

To accept certiorari will utilize the efforts of the multitude of courts, judges, litigants and lawyers. They have patiently contributed to creating a pyramid of law now awaiting the placing of the keystone in the arch to cast light in the field of administration of union contracts.

As a perceptive commentator has said in invoking guidance from this Court:

> "The ultimate resolution of these problems lies with the Supreme Court, and the time is at hand for the Court to make good the obligation which it assumed when it first defined the duty of fair representation: to accept and decide a sufficient number of cases in the area within a reasonable time to provide the basic guidance necessary

[4] *Sherman, Union's Duty of Fair Representation and The Civil Rights Act of 1964,* Page 820.

for the further development and integration of this new field of law." (Blumrosen, WORKER-UNION RELATIONSHIP, Mich. L. Rev., Vol. 61, pp. 1435, 1500.)

Two other matters of extreme importance to all employees and unions in the future handling of grievances are:

(1) In contemplation of the impact of the new unfair labor practice relating to the breach of the union's duty of fair representation, does a grievant have any duty to attempt to exercise any rights he claims have been denied him before the union is under the mandate to process a grievance.

This problem transcends concern about the union's "discretion" as it presents head-on to the union the question as to whether it must take the initiative in areas where the claimed employer's offense has been one of omission rather than commission. In the administration of the collective bargaining agreement this is the area most important to the union and to its members.

Can a bargaining unit member who has never sought permission to play on a company golf course or attend a company sponsored dance and has, of course, never been refused permission to do so, compel the union to file a grievance to secure such "rights"? Would it make any difference if the bargained for employee is Negro?

(2) Does the National Labor Relations Board act properly in ordering a local union (whose contracts are negotiated on an international level) to engage in bargaining at the local level regarding matters of racial discrimination?

The Court of Appeals has a narrow review of the remedies imposed by the Board. It is not the function of the Court of Appeals to fashion remedies for the N.L.R.B., but still the Board's requirements must stand the test of reasonableness. *Local 57, ILGWU, AFL-CIO v. NLRB,* 374 F. 2d. 295 (C.A.D.C., 1967); *NLRB v. Seine Line Fishermen's Union of San Pedro,* 374 F. 2d. 974 (C.A.L., 1967).

National Labor policy tends to separate the problems relating to negotiating a collective bargaining agreement from those arising out of administering the same.[5] At the local union level practical, rapidly developing daily crises are resolved, or compromised in an unsophisticated environment.

The NLRB by its remedial order ignores this. Only this Court can chart a sensible course. The parties in this course can assist.

CONCLUSION.

In conclusion, it is respectfully prayed that certiorari issue to the United States Court of Appeals for

[5] Blumrosen at 1475 et seq.

the Fifth Circuit to review and revise its decision issued November 9, 1966 and reported at 368 F. 2d. 12.

Respectfully submitted,

HAWKINS, RHEA & MITCHELL,
930 Forrest Avenue,
Gadsden, Alabama,

By CLARENCE F. RHEA,
Attorneys for Petitioner, Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO.

CERTIFICATE.

The undersigned Clarence F. Rhea, Hawkins, Rhea & Mitchell, 930 Forrest Avenue, Gadsden, Alabama, attorney of record for the petitioner in this cause, hereby certifies that this Petition for Re-Hearing after Denial of Writ of Certiorari is presented in good faith and not for delay. The undersigned counsel also certifies that the Petition is restricted to the grounds above specified and this Certificate is given in compliance with Rule 58 (2) of the Rules of the Supreme Court.

CLARENCE F. RHEA.

CERTIFICATE OF SERVICE.

I hereby certify that copies of the foregoing Petition for Re-Hearing after Denial of Writ of Certiorari have been served upon Marcel Mallet-Prevost, Attorney for Respondent, by mailing them to him at the National Labor Relations Board, 1717 Pennsylvania Avenue, N. W., Washington, D. C. 20006, and I further certify that a courtesy copy of this Petition for Re-Hearing is being furnished the following:

Robert L. Carter, Esq.
Attorney at Law
20 West 48th Street
New York, New York 10036

Walter C. Phillips, Esq.
National Labor Relations Board
Region 10
Room 701, 730 Peachtree Street, N.E.
Atlanta, Georgia 30308

The Business League of Gadsden
P. O. Box 828
Gadsden, Alabama 35901
Attention: Mr. David Buckner

This the ... day of November, 1967.

.....

EXHIBIT I.

SUPREME COURT OF THE UNITED STATES

No. 194—October Term, 1967.

LOCAL UNION No. 12, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL-CIO,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD.

ORDER.

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for rehearing in the above-entitled case be, and the same is hereby, extended to and including Dec. 2nd, 1967.

(S.) HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 2nd day of November, 1967.